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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-152

THE CLEVELAND ELECTRIC ILLUMINATING CO.
Petitioner,

vs.

NED E. WILLIAMS, DIRECTOR
Ohio Environmental Protection Agency
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM J. BROWN
Attorney General of Ohio,

DAVID E. NORTHROP
Assistant Attorney General

Environmental Law Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

1. Nature of the Case

This matter arose upon application by Petitioner Cleveland Electric Illuminating Co. (hereinafter, CEI) for variances from air pollution abatement requirements imposed by regulations of the Ohio Environmental Protection Agency. CEI appeals from the order of Respondent Director of Environmental Protection denying the applications, and refusing to permit the administrative evidentiary hearing, held to grant Petitioner the opportunity to demonstrate its eligibility for variances pursuant to applicable regulations, to be converted into a forum for a broad-based challenge to air contaminant emission standards. CEI now claims that the Director's refusal to ignore or invalidate his regulations in a quasi-judicial context is in violation of the Clean Air Act and the Due Process Clause of the Fourteenth Amendment.

2. Course of Proceeding

In February, 1972, the Air Pollution Control Board promulgated regulations to remedy the pervasive problem of poor air quality in Ohio. The regulations resulted from amendment, in 1971, of Chapter 3704, Revised Code, in which the Ohio General Assembly granted the Board the authority necessary so that Ohio would "comply with the 1970 amendments of the Federal Clean Air Act," uncodified Section 4, Amended Substitute Senate Bill No. 370, 134 Laws of Ohio, page 650. The regulations established ambient air quality standards (prescribing concentrations of pollutants in the outdoor air necessary to protect public health and welfare), emission standards (applicable to each source of air contaminants), and regulations governing the issuance of permits and variances. The latter regulation unambiguously limited issuance of variances ---- which authorize emissions in excess of applicable emission standards ---- to contaminant sources which would commit to an abatement program resulting in compliance with emission standards, and prescribed dates beyond which variances would no longer issue. The regulations are now administered by the Director of Environmental Protection, and are substantially unchanged from their original promulgation over six years ago. The variance regulation, now numbered OAC 3745-35-03 (Appendix G, p. A 165, Petition for Writ of Certiorari), has been amended to extend the deadline dates, but has never been altered so as to delete the requirement of ultimate compliance with emission standards (OAC 3745-35-03 (F) (1)), and the preclusion of issuance of variances beyond a specified date (OAC 3745-35-03 (F) (2)).

CEI, in August of 1972, applied for variances for air contaminant sources at its Lake Shore plant. The applications did not, despite the clear provisions of OAC 3745-35-03, commit CEI to timely compliance with emission standards, but rather sought to challenge the air pollution regulatory code as unlawful and therefore inapplicable to Lake Shore. The Director was requested, in effect, to respond to CEI's applications by declaring his own regulations unlawful and granting to CEI a new, lenient emission standard in an administrative order to be denominated a "variance."

The Director declined CEI's request to ignore his own regulations, but rather, in May, 1973, issued proposed variances to the Lake Shore plant which, as required by OAC 3745-35-03, contained schedules by which applicable emission standards

in OAC 3745-17-10 and OAC 3745-17-13 (Appendix G, p. A 164, Petition for Writ of Certiorari) were to be attained. CEI, in June, 1973, requested adjudication hearings, thereby preventing the proposed variances from becoming final until completion of hearing proceedings. At hearing, CEI did not attempt to demonstrate its eligibility for variances under OAC 3745-35-03, but rather adduced evidence upon which the Director was requested to rule that OAC 3745-17-10, OAC 3745-17-13, and OAC 3745-35-03, in spite of their clear applicability to Lake Shore, were to be shunted aside and variances issued containing more lenient terms acceptable to CEI. Thus, CEI persisted in its quest for a rewriting of the air pollution regulatory code applicable to the Lake Shore plant.

On December 12, 1974, the Director issued his decision (Appendix E, p. A 101, Petition for Writ of Certiorari). Because he was now convinced that his sulfur dioxide emission standard regulation, OAC 3745-17-13, was more stringent than necessary to achieve the purposes of Chapter 3704, Revised Code, the Director appropriately declined to issue the variances sought by CEI, for, as required by OAC 3745-35-03 (F) (1), such variances would necessarily contain a schedule within which CEI would be required to comply with such emission standard. As to emissions of particulate matter, however, the Director found no reason to further delay compliance with the emission standard regulation. He therefore issued an enforcement order pursuant to Section 3704.03 (S), Revised Code, requiring compliance with the particulate matter emission standard regulation by April 15, 1977, the date prescribed by OAC 3745-17-04 upon which the ambient air quality standards are to be attained. The Director again explicitly declined to rewrite his regulations, stating, at page 16 of his opinion:

> The Director is bound by law and his own regulations to base his final decision in any adjudication hearing solely on the evidence presented in the record. When deciding the outcome of an adjudication hearing, the Director can not act in a legislative (rulemaking) capacity. He must act as judge.

And, at page 20:

> The Director is not at liberty to address the general validity of his own regulations in the context of this final findings and order. Regulations may be amended or rescinded only through the procedures established in Section 119.03 of the Ohio Revised Code.

Therefore, the quasi-judicial rulemaking sought by CEI was not forthcoming from the Director.

In January, 1975, CEI appealed the Director's action to the Environmental Board of Review. The Northern Ohio Lung Association (herinafter referred to as NOLA), which had participated as a party in the proceedings before the Director, also appealed. The Board, in October, 1976, reversed the Director only insofar as he had failed to require compliance with the sulfur dioxide emission standard, OAC 3745-17-13, and ordered the Director to issue variances to the Lake Shore plant imposing thirty-six month schedules for compliance with OAC 3745-17-13. The Board failed to note that such schedules extended beyond the deadline date of April 15, 1977, prescribed by OAC 3745-35-03 (F) (2). The Board expressly affirmed the Director's refusal to engage in *de facto* rulemaking in the context of a quasi-judicial administrative hearing.

CEI and NOLA appealed to the Court of Appeals, Franklin County, which holds appellate jurisdiction pursuant to Section 3745.06, Revised Code. NOLA assigned as error the Board's order that the Director issue variances beyond the date of April 15, 1977, prescribed by OAC 3745-35-03 (F) (2), beyond which variances would not issue. The Director joined in NOLA's contention, and argued that OAC 3745-35-03 (F) (2), as a lawful regulation, required the court to reverse the Board's order that variances issue after April 15, 1977. CEI persisted in its contention that the Director should have given cognizance to its challenge to the air pollution regulatory code and that, in any event, the April 15, 1977, date prescribed by OAC 3745-35-03 (F) (2) beyond which variances would not issue was unlawful as in conflict with Section 3704.03 (H), Revised Code.

The court rendered its decision on December 8, 1977 (Appendix C, p. A 4, Petition for Writ of Certiorari). In a lengthy and unanimous opinion, the court correctly concluded that, a.) the provision in OAC 3745-35-03 (F) (2) that variances not issue after April 15, 1977, to sources (such as Lake Shore) located in dirty air areas (Priority 1 regions) is a lawful and reasonable regulation, and therefore dispositive in requiring reversal of the Board's order that variances issue to Lake Shore after that date; b.) OAC 3745-35-03 (F) (1), requiring that each variance, if issued, require abatement of emissions to attain compliance with emission standards, is lawful as in conformance with express provisions of Section 3704.03 (H), Revised Code; and c.) an adjudication hearing, being quasijudicial, is not a proper forum for a generic challenge to an administrative regulation for the purpose of achieving a *de facto* modification or

rescission of the regulation. The court therefore reversed the Board as to the first holding, and affirmed the Board and Director on the latter two. The court remanded the case to the Board for further proceedings consistent with the court's opinion.

Upon appeal, the Supreme Court of Ohio refused jurisdiction, noting the lack of a "substantial constitutional question." (Appendix B, p. A 2, Petition for Writ of Certiorari).

CEI, on or about July 28, 1978, filed its Petition for Writ of Certiorari in this Court raising two bases upon which the petition is to be granted. The first, that the result below contravenes the Clean Air Act, 42 U.S.C. 7401, *et. seq.,* is erroneous in contending that such enactment imposes standards of leniency upon the States in regulating sources of air pollution. The second, that the Clean Air Act and due process require that a State provide a forum for a pre-enforcement challenge to air contaminant emission standards, is also in error, and asks the Court to discover in the Due Process Clause a new and hitherto unarticulated procedural imposition upon State regulatory processes. Neither basis warrants granting the petition.

QUESTIONS PRESENTED

1. Does the denial of an application for a post-attainment variance from emission standards contravene the Clean Air Act, 42 U.S.C. 7401, *et seq.,* when such deial is based upon an expired deadline date prescribed by OAC 3745-35-03 (F) (2), which regulation has been upheld as lawful under Ohio law?
2. Do the Clean Air Act or the Due Process Clause of the Fourteenth Amendment impose a requirement upon the State of Ohio to provide to CEI a forum within which it may mount a pre-enforcement challenge to air contaminant emission standards?

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. The Clean Air Act Does Not Require A State To Issue Post-Attainment Date Variances Should It Choose Not To Do So.

At pages 14 through 16 of the Petition for Writ of Certiorari, CEI argues that OAC 3745-35-03 (F) (2), which prohibits issuance of variances to CEI after the attainment date of April 15, 1977, for particulate matter and sulfur dioxide, is violative of the Clean Air Act. Such a contention is flatly in error.

It should be noted at the outset that we deal here with a regulatory provision upheld below as lawful under Ohio law by the Court of Appeals, Franklin County, Ohio (Appendix C, p. A 18, Petition for Writ of Certiorari). Therefore, unless held to violate federal law, the variance deadline date of April 15, 1977, is dispositive of CEI's attempt to obtain a variance.

The Clean Air Act is drafted to scrupulously protect a State's option to impose requirements more stringent than the minimum requirements of the Act. 42 U.S.C. 7416, entitled Retention of State Authority, unambiguously provides, in pertinent part:

> . . . [N]othing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or *(2) any requirement respecting control or abatement of air pollution;* except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section. (Emphasis added).

Therefore, CEI's argument that the Clean Air Act imposes maximum levels of stringency upon the States with regard to issuance of variances flatly contradicts 42 U.S.C. § 7416.

Moreover, nothing in this Court's decisions in *Train v. Natural Resources Defense Council,* 421 U.S. 60 (1975), and *Union Electric Company v. EPA,* 427 U.S. 246 (1976), warrants the conclusion that the Clean Air Act *requires* a State to issue post-attainment variances consistent with attainment of ambient air quality standards. Rather, such cases merely interpret the Act to *authorize* such variances as part of

a State's implementation plan, should requisites of 42 U.S.C. § 7410 be met. This distinction between requirement and authorization was recognized by the Court in *Union Electric, supra*. There, having earlier discussed 42 U.S.C. § 7416, the Court concluded, at 427 U.S. 269, that a challenge in a federal forum to a State's implementation plan as overly stringent "would [improperly] permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left with the States, so long as national standards were met, the power to determine which sources would be burdened by regulation and to what extent."

Clearly therefore, CEI's argument that OAC 3745-35-03 (F) (2) is somehow invalid as more stringent than authorized by the Clean Air Act must fail as the very type of challenge disapproved of in *Union Electric, supra.* Such contention, surely, does not warrant issuance of a writ of certiorari.

2. The Clean Air Act Does Not Require That A State Provide A Forum Within Which An Air Polluter May Mount A Pre-enforcement Challenge To Emission Standard Regulations.

Equally faulty is CEI's argument, at pp. 11 through 14 of its Petition, that the Clean Air Act requires provision by a State of a pre-enforcement remedy by which an air polluter may seek invalidation of emission standard regulations. Surely, to so conclude is to invade the State's right, protected by 42 U.S.C. § 7416, to regulate air pollution as it pleases in a manner not less stringent than the Clean Air Act. Moreover, CEI points to nothing in the Act which imposes upon the States such a judicial or quasi-judicial remedy as part of the State's regulatory program.

CEI also errs in contending that it never had available to it a pre-enforcement remedy against emission standards. Prior to creation of the Environmental Board of Review on October 23, 1972, and the vesting of exclusive jurisdiction in the Board over environmental matters of this sort, Section 3745.04, Revised Code, CEI had available to it an action in declaratory judgment, *Burger Brewing Co. v. Liquor Control Commission,* 34 Ohio St.2d 93 (1973). Although extinguished when the

Board was created, *State, ex rel. Williams v. Bozarth,* 55 Ohio St.2d 34 (1978), an action in declaratory judment was a remedy available to, but not used by, CEI for a period in excess of eight months after promulgation of the challenged emission standards.

Even assuming, *arguendo,* that the State of Ohio never provided to CEI a pre-enforcement remedy to challenge emission standard regulations, CEI errs in contending that cases interpreting the Clean Air Act impose upon the State the obligation to provide such a remedy. Primary reliance is placed by CEI upon the Court's statement in *Union Electric, supra,* at 427 U.S. 266:

> Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency *formulating* the implementation plan. . . Moreover, if the industry is not exempted from, or accommodated by, the original plan, it *may* obtain a variance. . . Lastly, an industry denied an exemption from the implementation plan, *may* be able to take its claims of economic or technological infeasibility to state courts. (Emphasis added).

CEI misconstrues this passage to constitute a delineation of requirements placed upon the States by the Clean Air Act. Rather, the Court was merely pointing out the likelihood that States "may", as a matter of state law, provide the very remedy sought by Union Electric in a federal forum. Moreover, the Court's choice of the present tense in use of the term "formulating" indicates that the Court was referring to participation by air polluters in the plan development process, rather than provision of a remedy to challenge the plan after its promulgation. In sum, the quoted passage simply does not support CEI's reading of the Clean Air Act as requiring provision of a pre-enforcement remedy to challenge emission standards.

Equally unhelpful are the two *Buckeye* decisions of the Sixth Circuit, *Buckeye Power, Inc., et al., v. E.P.A.,* 481 F.2d 162 (6th Cir., 1973) (*Buckeye I*); *Buckeye Power, Inc., et al., v. E.P.A.,* 525 F.2d 80 (6th Cir., 1975) (*Buckeye II*). *Buckeye I* vacated the Administrator's initial approval of Ohio's implementation plan on procedural grounds arising under the Administrative Procedure Act, and did not address this issue. Also inapposite is *Buckeye II,* in which the court declined to address appellants' challenges to the reapproved implementation plan

on the *mistaken* belief that the Ohio Environmental Protection Agency adjudicatory hearings on CEI's (and other utilities') variance applications constituted a "process of adjustment" of the implementation plan, 525 F.2d at 84. The court should not have erred in its assessment of the scope of the state hearing, for the hearing had concluded over ten months earlier with the Director's decision of December 12, 1974, (Appendix E, p. A 101, Petition for Writ of Certiorari) in which the Director flatly held that, as a matter of Ohio law, such hearing did *not* constitute a forum within which the implementation plan may be adjusted. Nevertheless, it is clear from the opinion in *Buckeye II* that, as in *Union Electric,* the court was describing its understanding of *state* procedures, and not setting forth procedures required by the Clean Air Act.

In sum, CEI's contention that the Clean Air Act requires provision of a pre-enforcement remedy against emission standards is without merit, and does not warrant issuance of a writ of certiorari.

3. The Due Process Clause Of The Fourteenth Amendment Does Not Require That A State Provide A Forum Within Which An Air Polluter May Mount A Pre-enforcement Challenge To Emission Standard Regulations.

On pages 16 through 18 of its Petition, CEI asserts that the Due Process Clause requires provision of a pre-enforcement remedy to challenge emission standards. This quite remarkable assertion, to this writer's knowledge, has never been adopted by the Court. Indeed, the existence of a remedy in defense to enforcement would seem, under accepted due process analysis, to fulfill Ohio's obligation to provide a timely opportunity to CEI to assert its challenge to the regulations.

The three opinions of this Court upon which CEI relies do not support its novel due process analysis. In *Yakus v. United States,* 321 U.S. 414 (1944), the Court addressed several questions arising under the Price Control Act of 1942. Pertinent here is the Court's review of the statutory preclusion of pre-enforcement judicial review in favor of an exclusive administrative pre-enforcement review process. The Court held such preclusion to be constitutionally sound, and concluded that the procedural nature and timing of the remedy to challenge regulations is a matter committed, to a large degree, to legislative judgment. The Court stated, at 321 U.S. 439:

> If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation.

And, at page 422:

> Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity.

Such passages are hardly consistent with CEI's view that Ohio must provide a pre-enforcement remedy against regulations designed to protect public health. Therefore, CEI's contention that *Yakus* "implie[s]" (petition for Writ of Certiorari, page 18) such a due process-imposed obligation does not survive a close reading of the case.

Also unhelpful is *Goldberg v. Kelley*, 397 U.S. 254 (1970). CEI draws from that case the principle that a hearing must be afforded to a beneficiary of government programs "at a meaningful time and in a meaningful manner," 397 U.S. at 267. Such case is, of course, distinguishable from the instant case, in which CEI is subject to police power regulations, not public beneficence. Moreover, if an analogy is to be drawn, a defense in the enforcement action pre-dates imposition of sanctions for violation of a regulation in the same manner that a pre-termination hearing pre-dates cessation of benefits. Such a defense is, therefore, at a meaningful time and place. *Goldberg* is, therefore, of no help to CEI.

CEI's reliance upon *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is even more misplaced, for such case is better cited for the proposition that the Due Process Clause does not go as far as CEI contends. No constitutional issue was presented in *Abbott Laboratories*, but rather, "whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner." 387 U.S. at 139. Upon examination of that statute, the Administrative Procedure Act, and the Declaratory Judgment Act, the Court decided the issue in the negative. The Due Process Clause was not part of the analysis.

The Court did, however, note that had the intent of Congress been to the contrary, the Court would be bound thereby, thus necessarily concluding that Congress is under no constitutional mandate to provide the pre-enforcement remedy. Such is apparent from the passage set forth at page 153:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and Declaratory Judgment Act must be permitted, *absent a statutory bar* or some other unusual circumstance, neither of which appears here. (Emphasis added).

Because Congress may impose "a statutory bar" to availability of a pre-enforcement remedy, such a remedy cannot be required by the Due Process Clause. CEI's reliance on *Abbott Laboratories*, therefore, is wholly in error.

The Court should decline to accept CEI's invitation to stretch the Due Process Clause well beyond its recognized scope, and deny the Petition for Writ of Certiorari.

4. The Director Has Rescinded The Ohio Sulfur Dioxide Emission Standard Regulation.

At page 10 of its Petition, CEI seeks review on the ground that it must comply with both federal and state sulfur dioxide emission standards. Although not a proper basis for review, CEI's perceived difficulties have been obviated by the Director's rescission, on August 8, 1978, of OAC 3745-17-13, the Ohio sulfur dioxide emission standard. Therefore, the Court need not address the dual regulation contention through issuance of a writ of certiorari.

CONCLUSION

The denial of CEI'S applications for variances violates neither the Clean Air Act nor the Due Process Clause as interpreted by this Court. Accordingly, a writ of certiorari should not issue.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

DAVID E. NORTHROP
Assistant Attorney General

Environmental Law Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Attorney for Respondent